

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

MARK S. BELLINGS,

Plaintiff,

vs.

PENINSULA GAMING CO., LLC d/b/a
DIAMOND JO CASINO,

Defendant.

No. C03-1039

ORDER

This matter comes before the court pursuant to the defendants' September 19, 2003, motion for summary judgment (docket number 22). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge. For the reasons set forth below, the defendant's motion is granted.

Statement of Material Facts Taken in a Light Most Favorable to the Plaintiff

Plaintiff Mark Bellings brings this employment discrimination action against defendant Peninsula Gaming Co., LLC. Plaintiff claims that the defendant terminated his employment at the defendant's Diamond Jo Casino because of his alleged disability, in violation of the American With Disabilities Act of 1990 (ADA).

The plaintiff was employed at the Diamond Jo Casino from 1994 until 2002. He was first employed as a security guard but was shortly moved to the position of a security dispatcher, a position at which he remained until the termination of his employment in 2002. In his position as a security dispatcher, the plaintiff was responsible for various duties, including: answering phones, watching surveillance cameras, changing videotapes, making radio contact with supervisors, patrolling, walking around, bending and reaching. Specifically, the job description for a Security Dispatcher at Diamond Jo requires that the

employee be able to carry weights up to thirty pounds with one arm. The plaintiff rarely, if ever, had to restrain or apprehend any individuals while working at the Diamond Jo. During the course of his employment at Diamond Jo, the plaintiff carried a fire extinguisher one time.

The plaintiff suffered a non-work related injury to his back on August 7, 2002, when a child jumped on him. As a result of this injury, the plaintiff visited Finley Hospital in Dubuque, Iowa. He was treated and released from the hospital, although he was given work restrictions including no bending, lifting, stooping, no repetitive lifting/reaching in a horizontal plain, and no lifting over five pounds.¹ On August 8, 2002, the plaintiff filled out a request for family medical leave from the casino as a result of his back injury and did not return to work at the Diamond Jo. On October 31, 2002, the plaintiff received a letter from the Diamond Jo informing him that he was terminated from his position because he had not returned to work after his family medical leave. Before terminating the plaintiff's employment, the defendant never discussed possible accommodations with the plaintiff nor did the defendant ever consider whether the plaintiff could be accommodated.

After his termination from the Diamond Jo, the plaintiff was employed at Simoniz Car Wash. However, his employment there was subsequently terminated and the plaintiff has not been employed since. On June 3, 2003, the defendant sent a letter to the plaintiff informing him that he was eligible to be rehired at the Diamond Jo but that he would need to be able to perform the essential functions of any position, with or without reasonable

¹The plaintiff included various medical records in his appendix to his resistance to defendant's motion for summary judgment. However, the court does not consider these records because the records are not supported by affidavits based on personal knowledge establishing a foundation for the medical records as is required by Federal Rule of Civil Procedure 56(e). The court considers only those medical records with the proper foundation, namely the reports arising from the plaintiff's visit to Finley Hospital.

accommodation. As a result of the back injury he suffered on August 7, 2002, the plaintiff applied for Social Security Disability Insurance benefits on February 13, 2004; alleging a disability onset date of August 7, 2002.

Summary Judgment Standard

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant “may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). “To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact.” Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although “direct proof is not required to create a jury question, . . . to avoid summary judgment, ‘the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.’” Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. Although it has been stated that summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an

essential element of her case. Helfter v. UPS, Inc., 115 F.3d 613, 615-16 (8th Cir. 1997). The standard for the plaintiff to survive summary judgment requires only that the plaintiff adduce enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant's motive, even if that evidence did not directly contradict or disprove defendant's articulated reasons for its actions. O'Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995). To avoid summary judgment, the plaintiff's evidence must show that the stated reasons were not the real reasons for the plaintiff's discharge and that sex or other prohibited discrimination was the real reason for the plaintiff's discharge. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (quoting the district court's jury instructions).

CONCLUSIONS OF LAW

The Americans With Disabilities Act

The defendant claims that it is entitled to summary judgment on Bellings's disability discrimination claim because he has generated no genuine issue of material fact and cannot establish a prima facie case of discrimination. Bellings argues that there exists a genuine issue of material fact regarding his disability discrimination claim, thereby precluding summary judgment. This court agrees with the defendant.

The Americans With Disabilities Act (ADA) forbids employers from discriminating against an otherwise qualified employee with a disability, because of that disability. 42 U.S.C. § 12112(a); Pedigo v. Pam Transport, Inc., 60 F.3d 1300 (8th Cir. 1995). A qualified individual is a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. 42 U.S.C. § 12111(8).

Under the ADA, a plaintiff must establish a prima facie case by showing that he (1) was disabled within the meaning of the Act, (2) was qualified to perform the essential functions of the job, with or without reasonable accommodation, and (3) suffered an

adverse employment action under circumstances giving rise to an inference of unlawful discrimination. Snow v. Ridgeview Medical Center, 128 F.3d 1201 (8th Cir. 1997) (citing Webb v. Garelick Mfg. Co., 94 F.3d 484, 487 (8th Cir. 1996)). After an ADA plaintiff establishes a prima facie case, a rebuttable presumption of discrimination attaches and "the burden of going forward with evidence shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action." Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir. 1996), cert denied, 117 S. Ct. 274, 136 L. Ed. 2d. 197 (1996). Once an employer comes forward with such a reason, the presumption of discrimination is rebutted. Id. At that point, the burden shifts back to the plaintiff to prove that the defendant's proffered reason is pretextual. Id. At all times, the plaintiff retains the burden of persuading the trier of fact that he has been the victim of discrimination. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

Disabled Within the Meaning of the ADA

The defendant argues that the plaintiff cannot establish the first element of his prima facie case, namely that he was disabled. Therefore, the defendant claims that it is entitled to summary judgment. Bellings claims that there exists a genuine issue of material fact as to whether he is a disabled individual within the meaning of the ADA.

A plaintiff may prove disability by showing that he either (1) has a disability as defined under the ADA, (2) suffers from a history of such a disability, or (3) is perceived by his employer as having such a disability. 42 U.S.C. § 12102(2)(A)-(C). The ADA defines "disability" as (a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment, or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2)(A)-(C). In the present case, the plaintiff contends that he is disabled within the meaning of the ADA for two reasons: first, his impairment substantially limits one or more major life activity; and, second, the defendant regarded him as disabled. When the evidence in this case is viewed

in the light most favorable to the plaintiff, there is no genuine issue of material fact as to whether the plaintiff is substantially limited in one or more major life activities.

The adjectives "substantially" and "major" indicate that the perceived impairment must be a significant one. Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995). Working is a major life activity that, if substantially limited by an impairment, brings an individual within the protection of the ADA. Smith v. City of Des Moines, Iowa, 99 F.3d 1466 (8th Cir. 1996). The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. Id. See also Snow, 128 F.3d 1201. A person claiming a disability must show that the impairment significantly restricts his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. Aucutt v. Six Flags Over Mid America, 85 F.3d 1311 (8th Cir. 1996). See also Miller v. City of Springfield, 146 F.3d 612, 614 (8th Cir. 1998) ("A finding that a plaintiff is substantially limited in working requires a showing that [his] overall employment opportunities are limited."). Moreover, "[t]he determination of an individual's ability to work in a class of jobs or a broad range of jobs must be made without regard to the possibility of accommodation." Bearshield v. John Morrell & Co., 570 N.W.2d 915, 921 (Iowa 1997). See also Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997) (quoting 29 C.F.R. Pt. 1630, App. § 1630.2(j)) (determining whether an individual is substantially limited in a major life activity must be made without regard to mitigating measures such as medicines, or assistive or prosthetic devices).

A person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled. Webb, 94 F.3d 484. A court must ask whether a particular impairment constitutes for the particular person a significant barrier to employment. This requires an individualized assessment of the extent to which the allegedly disabling condition limited the plaintiff's meaningful

opportunities for employment. Id. Thus, an individual who has a back condition that prevents that person from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs. 29 C.F.R. § 1630.2(j)(3)(ii), cited in Webb, supra.

To analyze the degree of impairment, EEOC regulations consider the following factors in determining whether an individual is substantially limited in a major life activity. First, the nature and severity of the impairment; second, its duration or expected duration, and third, its actual or expected long-term impact. Aucutt, supra. Thus, where a 25-pound lifting restriction was the only medical limitation placed on an employee's activities after hospitalization, the employee had failed to present sufficient evidence to establish that he was substantially limited in a major life activity. Aucutt, supra.

It is undisputed that Bellings has sustained an injury to his back. However, a disability under the ADA requires permanent or long term impairments. Gutridge v. Clure, 153 F.3d 898, 901 (8th Cir. 1998). Furthermore, a general lifting restriction imposed by a physician is not sufficient to constitute a disability under the ADA. Mellon v. Federal Express Corp., 239 F.3d 954, 957 (8th Cir. 2001). However, a back injury that substantially limits an individual's ability to work, twist, bend, stand, and lift can constitute a disability. Webner v. Titan Distributing Inc., 267 F.3d 828, 834 (8th Cir. 2001).

The plaintiff has failed to produce evidence to demonstrate that he was substantially limited in his ability to perform a major life activity as a result of the impairments to his back. First, the plaintiff contends that he was substantially limited in his ability to perform the major life activities of walking, bending, reaching, and sitting. The plaintiff has failed to produce any evidence beyond his own statement that his ability to walk or sit was

limited due to his back injury. Furthermore, even if the plaintiff were, as he claims, unable to walk or sit for more than thirty minutes, such a limitation would not constitute a substantial limit on a major life activity. See Wood v. Crown Redi-Mix, Inc., 339 F.3d 682, 985 (8th Cir. 2003) (holding that individual's inability to walk more than a quarter-mile without resting is only a moderate limit on a major life activity). Furthermore, in order to prove that he is substantially limited in his ability to perform tasks such as sitting, walking, bending, or reaching, the plaintiff can not offer only evidence of the medical diagnosis of an impairment; instead, he must offer evidence to prove that he is unable to perform the tasks central to his daily life. Philip v. Ford Motor Co., 328 F.3d 1020, 1025 (8th Cir. 2003) (citing Toyota Motor Manufacturing v. Williams, 534 U.S. 184, 198 (2002)). In the present case, the plaintiff has failed to produce any evidence to show how his back impairment impacts the tasks central to his daily life with respect to his ability to walk, sit, bend, or reach.

Second, the plaintiff contends that he was substantially limited in his ability to perform the major life activity of working. In order to be substantially limited in the major life activity of working, a plaintiff "must demonstrate an inability 'to work in a broad class of jobs.'" Crown, 339 F.3d at 686 (quoting Sutton v. United Air Lines, Inc., 527 US 471, 491 (1999)). Furthermore, a plaintiff must show that he has suffered a significant reduction in employment opportunities due to his impairments. Id. In the present case, the plaintiff has failed to produce sufficient evidence to demonstrate that he is unable to work in a broad class of jobs or that he has lost any employment opportunities due to the impairments stemming from his back injury.

The evidence presented by the plaintiff does not establish that he was unable to work in a broad class of jobs. Taken in the light most favorable to the plaintiff, the evidence shows that he has restrictions on walking, sitting, lifting, reaching, and bending; but the plaintiff has failed to demonstrate that these restrictions would prevent him from working

in the broad class of security jobs. There is simply no evidence in the record that the plaintiff is incapable of working as a security guard or dispatcher for an organization or business that does not require lifting thirty pounds in one arm. Furthermore, the plaintiff has presented no evidence, beyond his own self-serving statement, that he has lost employment opportunities due to his impairments. The plaintiff's affidavit provides a scintilla of evidence by stating that he has been told that he will not be hired due to his back injury; however, the mere existence of a scintilla of evidence in support of the plaintiff's position is insufficient to avoid summary judgment. Sprengr, 253 F.3d at 1110. Therefore, the plaintiff has failed to present sufficient evidence to create a genuine issue as to whether he is substantially limited in his ability to perform the major life activity of working.

The plaintiff also contends that he is disabled under the ADA because the defendant regarded him as having an impairment that substantially limited his major life activities. The "regarded as" provision "is intended to combat the effects of 'archaic attitudes,' erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." Wooten, 58 F.3d at 385. To establish that his employer regarded him as disabled, the plaintiff must show that the employer had misperceptions about him, either (1) that the employer believed the plaintiff had a substantially limiting impairment that he did not have or (2) that the employer believed the plaintiff had a substantially limiting impairment when, in actuality, the impairment was not so limiting. Simonson v. Trinity Regional Health System, 336 F.3d 706, 709 (8th Cir. 2003). The plaintiff contends that the second situation applies in the present case; in other words, the plaintiff contends that the Diamond Jo believed he had a substantially limiting back injury when, in actuality, the back injury was not substantially limiting. Furthermore, "being regarded as having a limiting but not disabling restriction [] cannot be a disability within the meaning of the ADA." Conant v. City of Hibbing, 271 F.3d 782, 785 (8th Cir. 2001).

Therefore, an employer is free to decide that limiting impairments make an employee unsuitable for a particular job without regarding that employee as disabled. Id.

In the present case, the plaintiff has failed to present evidence creating a genuine issue of material fact with respect as to whether the defendant regarded him as disabled. The evidence demonstrates that the defendant regarded the plaintiff as having work limitations, namely the inability to lift thirty pounds, that made him unsuitable for the job of security dispatcher and, therefore, did not allow him to return to work as a security dispatcher unless he was cleared of such a lifting restriction. Such action indicates that the defendant regarded the plaintiff as having a limiting impairment, but not that the defendant regarded the plaintiff as disabled. Furthermore, it is undisputed that the defendant sent a letter to the plaintiff some seven months after his termination stating that the plaintiff was eligible to be rehired, if he met the requirements for and could perform the essential functions of the job.

For the above reasons, the plaintiff has failed to introduce sufficient evidence to create a genuine issue of material fact and, as a matter of law, was not disabled under the ADA at the time of his termination. Therefore, the defendant is entitled to summary judgement because the plaintiff cannot establish a prima facie case under the ADA.

Qualified Individual With a Disability

Diamond Jo claims that Bellings has not made the requisite showing that he was able to perform the essential functions of his job, with or without reasonable accommodation, and is, therefore, not a qualified individual with a disability. According to the defendant, the essential functions of a security dispatcher include the ability to lift thirty pounds with one arm, as stated in the security dispatcher's job description. The defendant thereby contends that it is entitled to summary judgment because the plaintiff cannot establish the second element of his prima facie case. Bellings argues that the ability to lift thirty pounds is not an essential function of the security dispatcher position and that he has demonstrated

his ability to perform the essential functions of his job, with or without reasonable accommodation, thereby making summary judgment in favor of the defendant inappropriate.

Protection under the ADA extends only to “a qualified individual with a disability.” Benson, 62 F.3d at 1111 (quoting 42 U.S.C. § 12112(a)). Determining whether an individual is qualified requires a two-part analysis: “(1) whether the individual meets the necessary prerequisites for the job, such as education, experience, training, and the like; and (2) whether the individual can perform the essential job functions, with or without reasonable accommodation.” Id. at 1111-1112. There is no dispute regarding the first prong of this test as the plaintiff served as a security dispatcher for approximately eight years prior to his termination. However, the second prong of this inquiry is in dispute.

“An essential function ‘means the fundamental job duties of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the marginal functions of the position.” Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 787 (8th Cir. 1998)(quoting 29 C.F.R. § 1630.2(n)(1)). Factors to be considered when determining the essential functions of a job include:

- (1) the employer’s judgment as to which functions are essential;
- (2) written job descriptions prepared before advertising or interviewing applicants for the job;
- (3) the amount of time spent on the job performing the function;
- (4) the consequences of not requiring the incumbent to perform the function; and
- (5) the current work experience of incumbents in similar jobs.

Id., (quoting 29 C.F.R. § 1630.2(n)(3)). Another factor to consider in determining whether a job function is considered essential is whether there is only a “limited number of employees available among whom the performance of that job function can be distributed.” Id. (quoting 29 C.F.R. § 1630.2(n)(2)).

Within the job of security dispatcher, the parties agree that there are various duties required of someone in that position that are essential functions, including monitoring surveillance cameras, answering phones, keeping logs, preparing reports, and patrolling one side of the casino. The parties dispute, however, whether the ability to lift heavy weights and the ability to restrain and apprehend individuals is an essential function of a security dispatcher. The defendant contends that being able to lift thirty pounds with one arm, which the plaintiff is unable to do, is an essential function of the security dispatcher position because a security dispatcher sometimes has to move boxes and other heavy objects and, therefore, the plaintiff cannot establish that he is a qualified individual. Furthermore, the defendant contends that the plaintiff is unable to apprehend or restrain other individuals, another essential function of the security dispatcher position. The plaintiff counters by contending that the ability to lift significant weights and to apprehend and restrain are not essential functions because security dispatchers rarely have to do such tasks and that the plaintiff, during his time as a security dispatcher, was not required to do such tasks regularly. For example, it is undisputed that the plaintiff only had to carry a fire extinguisher once during his time as a security dispatcher. Essentially, the dispute comes down to whether the ability to perform physically demanding tasks, such as heavy lifting and restraining individuals, are essential functions of the security dispatcher position. While the police or security guards may not regularly restrain or apprehend individuals, they must be able to do so when the occasion arises. The ability to restrain unruly people is clearly an essential function of a security position.

Bellings has testified, and the defendant does not dispute, that he is capable of accomplishing many of the tasks required of a security dispatcher without any accommodation at all. Specifically, Bellings is able to perform the essential functions of watching security cameras, recording logs, patrolling the port side of the building, and others. A written job description for the position of security dispatcher includes the following job requirements:

- (1) Provides basic security coverage insuring that adequate protection is provided for the safety and assets of patrons, employees and the company;
- (2) Insures that proper security is provided for all transfers of monies within the casino; . . .
- (4) May assist with the control of alcohol on property;
- (5) Must be able to stand and walk for long periods of time;
- (6) Must be able to carry weight up to 30 lbs. in one arm.

The defendant contends that these requirements are essential functions of the security dispatcher position and that they require the ability to lift, bend, and stoop, which the plaintiff cannot do. The plaintiff again counters by arguing that the requirements listed in the job description are not essential functions. Furthermore, Bellings testified that he is capable of doing the functions that are essential by, for example, controlling alcohol on the property by telling people where they cannot have alcohol. There is also a significant dispute as to whether security dispatchers are responsible for having to apprehend and restrain individuals. The plaintiff testified that he did not have to apprehend or restrain individuals, only that he had to assist in doing so by notifying others of the unruly individuals and, perhaps, providing other assistance. The defendant, however, contends that the security dispatcher position requires that the plaintiff have a physical presence in order to control unruly individuals and to control alcohol in the casino. In short, viewing all of the evidence in a light most favorable to Bellings, the court concludes that the plaintiff's position as a security dispatcher required more than simply walking about the premises, monitoring cameras, and talking to people. The essential functions of a security

dispatcher include when the situation calls for it, the ability to physically restrain another individual. Because the plaintiff could not fulfill this essential function, he was not a qualified individual as a matter of law.

Adverse Employment Action Because of Disability

The defendant claims that its decision to terminate Bellings employment was not based on his disability. Rather, the defendant claims that its decision was based upon the plaintiff's failure to return to work after he was no longer on family medical leave. Bellings contends that direct evidence exists that the defendant terminated his employment and failed to reasonably accommodate him because of his disability.

To satisfy the third prong of a prima facie case of disability discrimination, the plaintiff must show that he suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. Snow, 128 F.3d 1201 (citing Webb, 94 F.3d at 487). However, if direct evidence exists that an employer took the adverse employment action because of an employee's disability, then the McDonnell Douglas burden-shifting analysis need not be applied. Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 762 (5th Cir. 1996). The record shows that the defendant made its decision to terminate Bellings's employment based upon his work restrictions, that prevented him from returning to work after his medical leave time had expired.

The defendant further contends that Bellings suffered no adverse action. The defendant argues that because the Diamond Jo, approximately eight months after terminating Bellings, sent a letter stating that he was eligible for rehire and that plaintiff did not pursue rehire, the plaintiff has not suffered any adverse action. This argument is clearly not supported by the evidence on the record. Prior to his back injury, Bellings was employed at the Diamond Jo. Subsequent to his injury, Bellings was terminated from this position. Clearly, the plaintiff appears to have suffered an adverse action.

Plaintiff's Receipt of Social Security Disability Insurance

The defendant finally contends that because the plaintiff receives Social Security Disability Insurance (SSDI) benefits, he can not demonstrate that he is entitled to benefits under the ADA. The plaintiff contends that his receipt of SSDI benefits does not prevent him from recovering under the ADA. Applying for and receiving disability benefits does not preclude a successful suit under the ADA, nor does it create a presumption against an ADA suit. Cleveland v. Policy Management Systems, 526 U.S. 795, 805 (1999). However, when the plaintiff in an ADA suit receives SSDI benefits, the plaintiff must offer a sufficient explanation reconciling the seemingly contradictory statements arising from claiming a disability and inability to work in order to receive SSDI benefits and pursuing a claim under the ADA in which the plaintiff contends that he is able to fulfill the essential functions of his prior position. Lane v. BFI Waste Systems of North America, 257 F.3d 766, 769-70 (8th Cir. 2001).

In the present case, the plaintiff has failed to provide a sufficient explanation to reconcile his receipt of SSDI benefits with his ADA claim. The plaintiff contends that he applied for SSDI benefits and pursued an ADA claim because he wanted to pursue alternative means of recovery. Furthermore, the plaintiff states that he pursued SSDI benefits in order to fulfill his duty to mitigate damages resulting from his allegedly improper termination from the Diamond Jo. These explanations, however, do not reconcile the plaintiff's inconsistent statements of claiming a disability that prevents him from working while also claiming that he is able to fulfill the essential functions of his prior position. Instead, these proffered explanations show only the plaintiff's motive for pursuing both SSDI benefits and an ADA claim. See Lane, 257 F.3d at 770 (holding that explanation which explains only the plaintiff's motive for filing for disability benefits is not sufficient explanation to reconcile contradictory statements). The plaintiff has offered no explanation or evidence to explain why, despite his claim of disability, he is capable of


performing the essential functions of his prior position. Therefore, the plaintiff has failed to sufficiently explain his contradictory statements, as is required by Cleveland.

Upon the foregoing,

IT IS ORDERED

That the defendant's motion for summary judgment is granted. The Clerk of Court shall enter judgment for the defendant.

February 2, 2005.



JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT